

Subject: Re: [Ext] note to IOT
Date: Thursday, October 18, 2018 at 10:11:47 AM Pacific Daylight Time
From: Samantha Eisner
To: McAuley, David, Contact Information Redacted
CC: Elizabeth Le

Hi David -

Thanks for your language. Attached is a further redline. The first paragraph appears to have a lot of changes, but what it does is:

- 1) adopt your language of "shall participate";
- 2) makes that language applicable to all three types of situations; and
- 3) is reframed in a bulleted list so as to avoid repeating the same participation right 3 times.

You'll see my comment that I do not recommend accepting the line regarding how amicus are informed. It creates a lot of vagueness in the document, and the procedures don't have other discussion about how parties are "informed". Again, this is something that we can continue discussing for the final set.

Finally, I reorganized the footnote to return to one sentence, as there was some duplication and reference to Bylaws sections that do not appear to apply to amicus. In this reorganization, I incorporate that concept of "broad participation" that was not in my previous sentence.

Please let us know your thoughts. It would be good if we could get this out either later today or by tomorrow .

Thanks,

Sam

Samantha Eisner
Deputy General Counsel, ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094
USA
Direct Dial: +1 310 578 8631

From: McAuley, David Contact Information Redacted
Sent: Wednesday, October 17, 2018 8:53 AM
To: Samantha Eisner; Contact Information Redacted
Cc: Elizabeth Le
Subject: RE: [Ext] note to IOT

Sam, Liz,

I am attaching a few changes to Sam's suggested language, shown in track change format.

David

David McAuley
Sr International Policy & Business Development Manager
Verisign Inc.
Contact Information Redacted

From: Samantha Eisner <Samantha.Eisner@icann.org>
Sent: Wednesday, October 17, 2018 10:28 AM
To: McAuley, David Contact Information Redacted; Bernard Turcotte Contact Information Redacted

Cc: Elizabeth Le <elizabeth.le@icann.org>
Subject: [EXTERNAL] Re: [Ext] note to IOT

I am about to step onto a plane, so please copy in Liz Le on your reply.

The language of the note works for me if you are OK with the language proposed yesterday.

Attached is a redline of the rules with the updates that I believe we agreed upon already, other than this new joinder language.

Thanks,

Sam

—

Samantha Eisner
Deputy General Counsel, ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094
USA
Direct Dial: +1 310 578 8631

From: David McAuley Contact Information Redacted
Date: Wednesday, October 17, 2018 at 7:17 AM
To: Samantha Eisner <samantha.eisner@icann.org>, "Bernard Turcotte Contact Information Redacted"
Subject: [Ext] note to IOT

Sam, Bernie:

Below is note I would send to IOT if we arrive at language.

I am working on Sam's email and will reply shortly

David

--

Dear members of the IRP IOT:

First, a word of thanks to those who participated in two productive calls during the week of October 8th.

As mentioned by Sam, we have an opportunity to have the board accept and approve 'interim rules of procedure' at ICANN 63 but we must move quickly to do so. In my opinion, establishing interim rules is timely (considering all the work we have done since October 2016) and appropriate.

Attached is the draft of the interim rules meant to capture what we discussed on the phone in the recent calls. Please take a good look.

I would like to note one particular area – that of Joinder etc. (Rule 7). You may recall that I, wearing my **participant** (not leader) hat, had suggested certain text and with Malcom's help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list – a way to try to take advantage of board action at next week's meeting.

Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 19. If we are agreed I will forward for board action.

And then, of course, we will turn to the very few remaining items for final rules – they should be able to follow in pretty quick order.

Best regards to all,
David

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. The following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, if requested, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. ~~shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL. Similarly, if the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and~~
- iii. ~~shall be deemed to have a material interest relevant to the DISPUTE and shall be permitted to participate as an *amicus* before the IRP PANEL. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity shall be deemed to have a material interest relevant to the DISPUTE and may shall be permitted to participate as an *amicus* before the IRP PANEL.~~

Formatted: Numbered + Level: 1 + Numbering Style: i, ii, iii, ... + Start at: 1 + Alignment: Left + Aligned at: 0.5" + Indent at: 1.15"

Formatted: No underline

Formatted: Highlight

Formatted: Highlight

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. [1] The *amicus curiae* shall be informed of the proceedings in the same manner as the parties thereto. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

Formatted: Highlight

Commented [SE1]: The procedures do not discuss what it means to be "informed" of proceedings, so I recommend removal, as this could lead to vagueness. I'm also not sure what this means. ICANN will always maintain the online docket of filings and orders. If this is anticipating different notification requirements on ICDR, we'd have to obtain their authorization before we could put this into effect.

Formatted: Highlight

[1] During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of briefing available participation from *amicus curiae*, the IRP PANEL shall also lean in favor of allowing broad participation of an *amicus curiae* as needed to further consider how the purposes of the IRP set forth at Section 4.3(a) of the ICANN Bylaws are furthered, including the need for coherent, consistent and just resolution of DISPUTES. In addition, the IRP PANEL shall allow persons, groups or entities with a material interest relevant to the DISPUTE to participate broadly as an *amicus curiae* consistent with ICANN's pertinent bylaws including without limitation Bylaw Sections 4.3(a) and 4.3(n)(iv)(B).

Commented [SE2]: They have to have a material interest to be an *amicus*, so nothing is added by this phrase.

Commented [SE3]: Reference to 4.3(a) is captured above.

Commented [SE4]: This refers to setting of rules for joinder and consolidation, which is handled separately in these procedures and reference thereto would likely lead to confusion.